Filed 5/12/10 P. v. Smith CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

GENO DELMAR SMITH,

Defendant and Appellant.

F057750

(Super. Ct. No. VCF214656)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Tulare County. Kathryn T. Montejano, Judge.

James H. Dippery, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Raymond L. Brosterhous II, Deputy Attorneys General, for Plaintiff and Respondent.

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[*]Before Ardaiz, P.J., Levy, J. and Dawson, J.

On February 18, 2009, Geno Delmar Smith (appellant) entered a negotiated no contest plea to false imprisonment (Pen. Code, § 236)[1] and misdemeanor battery on a cohabitant (§ 243, subd. (e)(1)). He also admitted three prior prison term allegations (§ 667.5, subd. (b)). In return, appellant was given an indicated sentence of two years with the understanding that a prior strike allegation (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)) would be dismissed and sentence on the remaining prior prison terms would be stayed. On April 1, 2009, the trial court sentenced appellant to the indicated term of two years. Appellant contends the trial court erred in denying probation. We disagree and affirm.

FACTS[2]

On December 17, 2008, appellant was living with S.B. when the two began arguing about his possible enrollment in a drug and alcohol rehabilitation program. S.B. indicated that the two should separate. When appellant refused S.B.'s request that he hand over her cell phone, she attempted to leave and use the telephone of a neighbor.

Appellant followed S.B. outside, forced her to the ground, and forcibly dragged her back into the house, where he struck her in the face with his closed fist and threatened to kill her. Appellant then pushed S.B. onto a couch and grabbed her neck.

Appellant subsequently admitted to a police officer that he and S.B. had argued and that he threatened to kill her. But he denied taking her cell phone and any physical violence. The officer observed a bruise on S.B.'s cheek.

DISCUSSION

Appellant's sole claim on appeal is that the trial court abused its discretion when it denied him probation and sentenced him to the indicated sentence of two years. He argues his case was "unusual" pursuant to section 1203, subdivision (e) because his current felony offense of "false imprisonment" was "significantly less serious" than any

[1]All further statutory references are to the Penal Code.

[2]The facts are not at issue and are taken from the probation report filed in this matter.

of his prior felony convictions and that he was "free of custody[] and productive" during most of 2008 prior to the current offense. We disagree.

"Probation is an act of leniency, not a matter of right." (*People v. Walmsley* (1985) 168 Cal.App.3d 636, 638.) A trial court has broad discretion to grant probation. (*People v. Lafantasie* (1986) 178 Cal.App.3d 758, 761.) Protection of the public, the nature of the offense, the interests of justice, reintegration of the offender into the community, and the defendant's needs shall be primary considerations. (§ 1202.7.) A decision denying probation will be upheld absent a clear showing the trial court's determination is arbitrary or capricious. (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 364-365.)

"Except in unusual cases where the interests of justice would best be served," section 1203, subdivision (e)(4) prohibits placing a defendant who has "been previously convicted twice … of a felony" on probation. Where probation is presumptively unavailable, the trial court must consider whether the statutory limitation has been overcome, based upon factors considered in California Rules of Court,[3] rule 4.413(c):

> "(1) *Facts relating to basis for limitation on probation* [¶] A fact or circumstance indicating that the basis for the statutory limitation on probation, although technically present, is not fully applicable to the case, including: [¶] (A) The fact or circumstance giving rise to the limitation on probation is … substantially less serious than the circumstances typically present in other cases involving the same probation limitation, and the defendant has no recent record of committing similar crimes or crimes of violence; and [¶] (B) The current offense is less serious than a prior felony conviction that is the cause of the limitation on probation, and the defendant has been free from incarceration and serious violation of the law for a substantial time before the current offense.
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> "(2) *Facts limiting defendant's culpability* [¶] A fact or circumstance not amounting to a defense, but reducing the defendant's culpability for the offense, including: [¶] (A) The defendant participated in the crime under circumstances of great provocation, coercion, or duress …, and the defendant has no recent record of committing crimes of violence; [¶] (B)

[3]All further reference to the rules is to California Rules of Court.

> The crime was committed because of a mental condition …, and there is a high likelihood that the defendant would respond favorably to mental health care and treatment that would be required as a condition of probation; and [¶] (C) The defendant is youthful or aged, and has no significant record of prior criminal offenses." (Rule 4.413(b), (c).)

When probation is statutorily prohibited except under unusual circumstances, the determination whether an unusual case exists lies in the discretion of the trial court. (*People v. Axtell* (1981) 118 Cal.App.3d 246, 257.)

Here, the probation report prepared in anticipation of sentencing stated appellant had negotiated a two-year indicated prison sentence, and it listed multiple aggravating factors related to both the offense and to appellant. The probation report noted that appellant had numerous prior offenses, including felony convictions for attempted burglary in 1995, second degree burglary in 2004, and petty theft with a prior theft in 2007. The probation report also listed parole violations in 1998, 1999, and 2007.[4] The probation report, in recommending the indicated two-year sentence, stated:

> "Except in unusual cases, section 1203(e)(4) PC limits the granting of probation when a defendant has two or more prior felony convictions. [Appellant] was on parole when the instant offenses occurred and has served three prior prison terms. Furthermore, the instant offenses occurred on the day after he had failed to appear for arraignment for battering the same victim just three months earlier. On balance, it does not appear this newest felony should qualify as an unusual case justifying a grant of probation."

At sentencing, the trial court considered the probation report and argument of counsel. It then noted that the circumstances of the crime "were particularly bad," and that it was "of particular concern" to the court that appellant had violated parole on a number of occasions. Probation was denied and appellant sentenced to the indicated term of two years.

Despite appellant's claim to the contrary, we find none of the factors listed in rule 4.413(c)(1) applicable to him. Whether or not his current offense of false imprisonment

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[4]At sentencing, appellant contested the accuracy of the 2007 parole violation.

was "substantially less serious than the circumstances typically present in other cases" where false imprisonment is involved, appellant did have a recent record of committing a crime of violence. Court records indicated that, at the time of the current offense, appellant had pending charges for an earlier battery of a cohabitant involving the same victim. Accordingly, rule 4.413(c)(1)(A) is inapplicable.

And whether or not the current offense was "less serious than a prior felony conviction," appellant had not, despite his claim to the contrary, "been free from incarceration and serious violation of the law for a substantial time before the current offense." (Rule 4.413(c)(1)(B).) Appellant's criminal record is lengthy, described by the trial court as "in and out of prison for in excess of 15 years." And, in fact, the current offense occurred on the evening after appellant failed to appear in the earlier case of battery of a cohabitant and, according to the probation report, was committed while appellant was on parole.[5] Rule 4.413(c)(1)(B) is therefore inapplicable.

We also find inapplicable the factors listed in rule 4.413(c)(2): There is no indication under the facts of the case that appellant participated in the crime under circumstances of great provocation, coercion, or duress; he did have a recent record of violence; nothing in the record indicated appellant suffered from a mental condition; and appellant, at age 31 at the time of the crime, was neither youthful nor aged. (Rule 4.413(c)(2)(A), (B), (C).)

Because the trial court acted within its discretion in concluding that appellant's case was not unusual, section 1203, subdivision (e)(4) precluded granting appellant probation. We reject appellant's claim to the contrary.[6]

DISPOSITION

The judgment is affirmed.

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[5]But see footnote 4, *ante*.

[6]Given our finding on this issue, we need and will not address respondent's contention that appellant is estopped from asserting error in a sentence to which he agreed to as part of a plea bargain.